82-1149

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1982

ALONZO MARQUEZ,

Petitioner,

v.

UNIVERSITY OF WASHINGTON; JOHN HOGNESS, President of the University of Washington; RICHARD RODDIS, Dean of the School of Law; and BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON,

Respondents.

Petition for Writ of Certiorari to The Court of Appeals for the State of Washington

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QUESTIONS PRESENTED 1/

1. Did the Washington State Appellate Court err in holding that the Respondents' Affirmative Action Program did not discriminate against petitioner as to race or otherwise unfairly treat Petitioner?

2. Did the Washington State Appellate Court err in holding that Petitioner's Equal protection rights were not violated under the Fourteenth Amendment to the United States Constitution?

3. Did the Washington State Appellate Court err in holding that Petitioner's Affirmative Action contract was not breached by Respondents?

4. Did the Washington State Appellate Court err in holding that summary judgment without a trial on the merits was the appropriate procedural method of dealing with these issues?

1/ A listing of names of all parties to this proceeding is included in the caption of this case.

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Alonzo Marquez, petitioner herein, respectfully pray that a Writ of Certiorari be issued to review the judgment of the State Court of Appeals for the State of Washington filed and entered in the above entitled cause on May 17, 1982.

OPINIONS BELOW

In 1978 the respondents moved for Summary Judgment. The Honorable Gerald M. Shellan of the King County Superior Court, thereafter, on April 17, 1978, granted the respondents motion for Summary Judgment. The opinion is reproduced herein as "Appendix A" to this petition.

On April 30, 1979, the Court of Appeals, Division I of the State of Washington, reversed Judge Shellan's order. The opinion was unpublished and is reproduced herein as "Appendix B" to this petition.

The respondents again renoted the motion for Summary Judgment in Judge Shellan's Court and on December 31, 1979, he orally granted Summary Judgment again, but stayed his decision for ninety days to permit some deposition discovery. Thus, on July 8, 1980, Judge Shellan entered an order incorporating by reference his December 31, 1979 oral opinion and granting respondents' motion for Summary Judgment. The opinion is reproduced herein as "Appendix C" to this petition.

On July 21, 1980, petitioner filed his appeal and on May 17, 1982, the State Court of Appeals of the State of Washington affirmed. The opinion is reported as 32 Wn. App. 302, and is reproduced herein as "Appendix C" to this petition.

Motion for Reconsideration of said decision was denied June 16, 1982, and is reproduced herein as "Appendix C" to this petition.

A Petition for Review of the said decision was denied October 8, 1982 by the Supreme Court of the State of Washington, and is reproduced herein as "Appendix D" to this petition.

JURISDICTION

The judgment of the State Court of Appeals of the State of Washington was made and entered on May 17, 1982. The petitioner herein filed a Motion for Reconsideration but was denied June 16, 1982 and a Petition for Review was filed with the Supreme Court of the State of Washington and was denied October 8, 1982.

The opinion below decides and applies important questions of federal and state law that is contrary to this Court. The opinion presents important questions of first impression, which until now has not been, but ought to be, decided by this Court. On this basis, petition is made to this Court prusuant to 28 U.S.C.A. Section 1257 and

U.S. Supreme Court Rule 17, for Certiorari to review the opinion below.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution states in part;

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 12 of the Washington Constitution states;

§ 12. Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Revised Code of Washington (R.C.W. 49.60) states in part;

49.60.010 Purpose of chapter

This chapter shall be known as the "Law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap; and the board established hereunder is hereby given general jurisdiction and power for such purposes.

49.60.030 Freedom from discrimination—Declaration of civil rights

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical handicap is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions without discrimination. *Provided*, That a practice which is not unlawful under RCW 48.30.300 or 48.44.220 does not constitute an unfair practice for the purposes of this subparagraph; and

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, national origin or lawful business relationship: *Provided however*, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices.

(2) Any person deeming himself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover the actual damages sustained by him, or both, together with the cost of suit including a reasonable attorney's fees or any other remedy authorized by this chapter or the United States Civil Rights Act of 1964; and

(3) Notwithstanding any other provisions of this chapter,

any act prohibited by this chapter related to sex discrimination or discriminatory boycotts or blacklists which is committed in the course of trade or commerce in the state of Washington as defined in the Consumer Protection Act, chapter 19.86 RCW, shall be deemed an unfair practice within the meaning of RCW 19.86.020 and 19.86.030 and subject to all the provisions of chapter 19.86 RCW as now or.

The United States Civil Rights Act of 1964.

STATEMENT OF FACTS

Plaintiff Alonzo Marquez is a resident of Washington and is of Mexican-American descent. Respondent University of Washington is an agency of the State of Washington. Respondents John R. Hogness and Richard P.L. Roddis were employees of the University responsible for its administration and the administration of the University of Washington School Law (hereinafter "the law school"). Respondents Board of Regents of the University of Washington are the duly constituted governing authority for respondent university.

The law school is a division of respondent university. The law school is the only public school of law in the state. Applications for admission for the 1972-1975 school year outnumbered available positions by about ten to one. Students were selected on the basis of several factors, particularly their Law School Admissions Test (LSAT) scores and their undergraduate grade point averages (hereinafter "GPA"). By using these two indicators, the law school derived a predicted first year averages (hereinafter "PFYA") for each applicant.

In order, among other reasons, to achieve a reasonable representation within the student body of historically disadvantaged minority groups, and in order to increase the number of minority attorneys practicing in Washington, the law school established an affirmative action program.

Under the affirmative action program, minority applications have been and are being accepted to the law school with PFYA's significantly lower than those of caucasian students.

Petitioner was accepted into the 1972-1973 entering class under the affirmative action program with a PFYA of 66.68. There were 22 special admittees in that class, that is, students admitted under the affirmative action program. All were minorities.

The law school required at that time that students attain a GPA of 68.00 their first year in order to remain in school. Petitioner's cumulative first year GPA was 63.94. At the completion of his first year, petitioner was one of 12 students in the class who achieved averages below 68.00. All 12 were special admittees. There were two students with averages lower than petitioner's.

The law school faculty decided on the recommendation of respondent Roddis to conditionally reinstate or continue all the students who achieved averages below 68.00. Four students, including petitioner, who were initially informed they were terminated, were required to repeat all courses in which they received a grade below 68.00. The other eight students whose averages were below 68.00 were not required to repeat any courses, but were allowed to repeat any course and receive the second grade. No caucasian students were required to repeat any courses, regardless of the grade received, however they were also allowed to repeat courses and receive the second grade.

A condition of petitioner's reinstatement was that he achieve a cumulative GPA of 68.00 at the end of the 1973-1974 school year. Failure to do so was to result in automatic dismissal for low scholarship. The same condition and ultimatum was imposed by respondents on the other three students. The same ultimatum was imposed on the eight students who achieved GPA's below 68.00.

At the end of his second year of law studies (1973-1974), petitioner had a cumulative GPA of 67.725. Since his averages was below 68.00, he was terminated. However, until that year GPA was computed by "rounding-off" to the nearest whole number to determine whether a student had achieved a satisfactory average. In preceding years other students, after their year of law studies, who had cumulative GPA's below 68.00 were rounded-off to 68.00. These students were retained by the law school. Petitioner was the only student in the position to use the rounding-off policy in 1973-1974 school year.

One other student who had been required to repeat courses was also terminated. No other students were terminated for low scholarship. There was another student admitted to the law school at the same time he was, who was also conditionally reinstated or continued at the end of the 1972-1973 school year, and who, at the end of the 1973-1974 school year had a cumulative GPA below 68.00 and below petitioner, but was not terminated. This student was also Mexican-American.

In May 1974, prior to informing petitioner, that he was terminated from the law school, respondents agreed to permit petitioner to attend classes during summer quarter 1974. Petitioner wanted to improve his GPA and increase his total number of credits. Respondents further agreed that summer credits would count as residence credits and that grades earned would be used in computing petitioner's GPA.

On or about August 15, 1974, respondents informed petitioner that he was to be terminated from the law school and that any grades earned during summer quarter would not count toward the calcula-

tion of his GPA and thus could not be used to raise petitioner's averages.

Dean Hunt did not follow established procedures when he terminated petitioner during the summer school quarter. He did not use the Rules for Retention and Readmission adopted by the faculty and Deans in May 21, 1974, which stated in a nutshell;

> in the case of minority students who are not meeting normal graduating requirements, the presumption shall be that the student will be retained and the risk is justified because of the need of the minority lawyers in the profession.

Instead, Dean Hunt used a guideline adopted by the same faculty and Deans on August, 1973 and dropped thereafter.

Dean Hunt admits using the May 21, 1974 Rule on the one Mexican-American student who had a lower grade point average than the petitioner and who was not terminated.

Furthermore, Dean Hunt did not follow the established Law School Scholarship and Conduct Rules, which state;

> by petitioner being allowed to attend summer school, he was granted permission to continue into the third year because the academic year includes summer, autumn, winter, and spring quarter. He should have not been terminated until spring quarter of the next year.

Thus, the law school should have allowed petitioner to complete the summer school quarter and allow the grades to count. He petitioned for reinstatement on October 2, 1975, the petition was denied by a vote of the faculty on October 7, 1975.

A source of petitioner's failure to do well academically at the law school was the very serious health problems he suffered while enrolled. He repeatedly asked respondents for a leave of absence. These requests were always denied. Other students had requested and been granted leaves of absence for health reasons during their first year at the law school.

In the 1972 University of Washington Bulletin and in the Pre-Law Handbook, their Affirmative Action program promised special academic aid to specially admitted law students. The Pre-Law Handbook stated that, "Special programs—including recruitment, admission, and financial and academic aid—are available for students of minority ethnic groups." Petitioner was induced, in part, to attend the law school by the agreement that academic aid would be provided. The law school in fact had no such program. Petitioner was not able to perform satisfactorily in his first year studies without special academic aid, and respondents knew this. Petitioner repeatedly requested such aid from the law school administrators. He was told

that various faculty members offered office hours, but that academic aid (also known as formal tutorial aid) was not available for petitioner or other special admittees.

In November 1977, petitioner filed an amended complaint against respondents claiming that the law school had breached contractual agreements with him, denied him equal protection of the law under the State and Federal Constitutions, and violated the State Anti-Discrimination Statute, RCW 49.60 and he sought readmission, $250,000 damages, attorney's fees and costs.

In 1978 the respondents moved for summary judgment. The Honorable Gerard M. Shellan of the King County Superior Court, thereafter, on April 17, 1978, granted the respondents motion for summary judgment. (See Appendix A)

On April 30, 1979, the Court of Appeals, Division I, reversed Judge Shellan's Order. (See Appendix B)

The respondents again renoted the motion for summary judgment in Judge Shellan's Court and on December 31, 1979, he orally granted summary judgment again, but stayed his decision for ninety days to permit some deposition discovery. Thus, on July 8, 1980, Judge Shellan entered an order incorporating by reference his December 31, 1979 oral opinion granting respondents' motion for summary judgment. (See Appendix C)

On July 21, 1980, petitioner filed his appeal and on May 17, 1982, the Court of Appeals affirmed the lower court. The Court concluded that the trial court did not err in granting summary judgment on the contract claims because the uncontroverted facts establish that the University of Washington School of Law did not breach its educational contract with petitioner, the record also does not establish or raise an inference of arbitrary and capricious action on the part of the University, the trial court did not err in granting summary judgment on the equal protection claim and lastly, the trial court did not err by granting summary judgment on the discrimination claim because there is no evidence whatsoever that the University discriminated against petitioner or treated him unfairly. (See Appendix D)

Petitioner filed a Motion for Reconsideration and it was denied June 16, 1982.

Petitioner then filed a petition for review on July 16, 1982 but was denied on October 8, 1982 by the State Supreme Court.

ARGUMENT FOR GRANTING THE WRIT

Additional reasons for granting this writ have been mentioned above and will not be repeated in this section.

(a) The Washington State Appellate Court has decided an im-

portant question of first impression, which until now has not been, but ought to be, decided by this Court.

The Revised Code of Washington (R.C.W. 49.60) and the United States Civil Rights Act of 1964 as referred to by said state statute prohibits discrimination by the law school against students because of their race.

Petitioner's legal theory may be simply expressed. Under the special admissions program, which was part of their affirmative action program, the law school recruited and admitted petitioner and other minority students who had lower undergraduate GPA's, LSAT scores, and Predicted First Year Averages than regularly admitted students. Petitioner's Predicted First Year Average was 66.8, below the 68.0 required to graduate. Respondents knew that petitioner and other specially admitted students would not be able to achieve satisfactory grades without special assistance. Despite this fact, they failed to provide *any* special program of academic aid for those students who had been specially admitted.

Petitioner and all other specially admitted students are ethnic minorities. By failing to provide any program for academic assistance for those students, the law school virtually guaranteed that petitioner and other specially admitted students would not be able to achieve satisfactory grades. They also virtually guaranteed that specially admitted students would have a very difficult time passing the bar exam and being admitted to the practice of law. The only people affected by this failure on the part of the respondents were specially admitted minority students, including petitioner. For this reason, the law school discriminated on the basis of race in violation of the R.C.W. 49.60 and the United States Civil Rights Act of 1964.

The effectiveness of the law school's special admissions program is, thus, of critical importance to petitioner's case. To the knowledge of the undersigned, this is a case of first impression, both in the State of Washington and elsewhere. Petitioner maintains that, since the effect of the inadequate program is felt only by racial minorities, it is impermissible race discrimination.

The Washington Supreme Court has determined that it is constitutional for the law school to institute an affirmative action program. *Defunis v. Odegaard*, 82 Wn. 2d 11 (1973). *Vacated as moot and remanded*, 416 U.S. 312, *No action on remand*, 84 Wn. 2d 617, 529 P. 2d 438 (1974). Also in *University of California Regents v. Bakke*, 438 U.S. 265, 57L Ed 2d 750, 98 S Ct 2733, Mr. Justice Powell suggests in announcing the judgment of the court that affirmative action programs that have race-conscious admissions policies are constitutional and did not necessarily violate Title VI of the Civil Rights Act of 1964. Mr. Justice Marshall, in a separate opinion,

also suggests that affirmative action programs should not be held to be unconstitutional.

In the trial on the *DeFunis* case, Dean Roddis testified concerning the importance of seeking a representation in the law school of students from minority groups. He stated that the presence of students from minority groups is important to the educational environment of a law school, and important to providing legal representation for those alienated from the legal system.

The *DeFunis* decision at page 33, also recognized the basic reasons for seeking to increase minority enrollment at the law school:

> It can hardly be gainsaid that the minorities have been, and are, grossly underrepresented in the law schools—and consequently in the legal profession—of this state and this nation. We believe the state has an overriding interest in promoting integration in public education. In light of the serious underrepresentation of minority groups in the law schools, and considering that minority groups participate on an equal basis in the tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling.

It is not enough simply to make special efforts to admit minority students to the law school, however. For the opportunity to be meaningful and to maximize the possibility that the specially admitted minority student will one day become a practicing attorney, it is necessary to provide special academic assistance after the student is admitted. At the trial in *DeFunis*, then President Odegaard testified and recognized the importance of "a certain amount of tutorial guidance and counseling" in developing successful specially admitted students.

When the special admissions program fails to provide special academic assistance, as it did in this case, it is virtually the same as having no special program at all. This is only one step removed from the situation whereby minorities are admitted and then provided no education. Such a situation is clearly not permissible.

(b) The standards applied by this court were not correctly applied by the Washington State Appellate Court.

The Washington State Appellate Court has also decided an important question of Federal Law such as to bring that court into apparent conflict with a decision of this Court on the same matter. The question alluded to is: Whether petitioner's equal protection rights were violated?

The standards applied by this Court in *Reed v. Reed*, 404 U.S. 71, 75-76, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971); were not correctly applied by the Washington State Appellate Court.

Petitioner agrees that the test to be applied here is that expressed in *Reed:*

> A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' 404 US. . at 76.

The "classification" here is the difference in treatment accorded to petitioner and to others similarly situated. The question then becomes whether this difference is reasonable as opposed to arbitrary, and whether it has a fair and substantial relation to a legitimate objective.

In this claim arbitrary, capricious or bad faith treatment by the Respondents against Petitioner were shown. One only has to look at the treatment accorded by Dean Hunt to petitioner and another specially admitted student at the end of the 1973-74 school year. Student number 16 and petitioner were continued after the first year on essentially identical terms, 1) they were both required to bring their cumulative GPA to 68 at the end of the second year or be dropped, 2) each were allowed to retake courses. At the end of the 1973-74 school year petitioner had a GPA at 67.725 and student number 16 had a GPA at 67.13. Student number 16 was allowed to continue and petitioner was dropped.

Dean Hunt admits *not* using the established Rules for Retention and Readmission adopted by the faculty and Deans in May 21, 1974 to determine whether petitioner should be terminated, however, he used the established rules on Student number 16. This distinction, between two people similarly, "circumstanced," does not withstand the examination required by *Reed, Supra.* Dean Hunt deviated from established procedures with no rational basis, and, in doing so, provided different treatment for the two students equally situated. This distinction was arbitrary and not rationally related to legitimate interests of the law school.

Furthermore, the termination of the rounding-off policy was felt solely by petitioner in the 1973-74 school year. The reasoning in terminating the policy was not rationally related to legitimate interests of the law school, but, one of individual dislikes of a policy that would possibly benefit minority students. The reason given for terminating the policy, that, "it was not on line with their wishes", is not what a rational person, given faculty status in a non-minority situation, would concur with. The faculty abused their discretion by acting in bad faith an arbitrary. This was not a reasonable exercise of their educational responsibility.

(c) The contract law standards applied by the 10th Cir. were

incorrectly applied by the Washington State Appellate Court.

This case has an immediate impact according to law on hundredth of thousands of students in Washington and throughout the United States attending post-secondary educational institutions.

Certainly, the contractual relationship between student and his institution has been judicially acknowledged, as shown by the citations in the opinion of the Washington State Court of Appeals, Appendix D, but elaborations such as furnished in the Washington State Appellate Court's opinion in this case has first impressions as to *Affirmative Action Programs* and their contractual implications.

When petitioner applied and was admitted to the University of Washington Law School, as an ethnic minority, the law school's Pre-Law Handbook of the Association of American Law Schools provided, in part;

> Special Programs—including recruitment, admission and financial and *academic aid*—are available for students of minority ethnic groups.

The above language became part of the contract, the law school breached that agreement, by not providing what was publicized in their Pre-Law Handbook, that is, a formal tutoring program for Special Admittees. This publicized Special Program was in practice prior to petitioner's first year and continued to be publicized but not practiced during two and a third years petitioner was a student at the law school.

The Washington State Appellate Court concluded that the Pre-Law Handbook did no more than announce that certain "programs" including "academic aid" to certain prospective students "are available". Furthermore, it did not tie the law school to a specific program or type of "academic aid". (See Appendix D at 4 and 5)

The Washington State Appellate Court's decision to modify the contract by changing the word of *Special* to *Certain* does not withstand the standard, upheld by *Slaughter v. Brigham Young Univ.*, 514 F. 2d 622, 627, (10th Cir.), *Cert. denied*, 423 U.S. 898, 46 L. Ed. 2d 131, 96 S. Ct. 202 (1975); where it states a "Court cannot so modify the student code." The same should be held for this case that is, the court cannot modify the law school Affirmative Action Contract with petitioner, nor its rules-regulations-policies-publications.

The law school is bound to adhere to the special programs published in their Pre-Law Handbook. The Special Academic Aid Program meant a formal structurized tutorial assistance program.

The key word is *Special*, which means:

"relating to or designating a species, kind, individual, thing, or

sort: designed for a particular purpose; confined to a particular purpose, object, person, or class. Unusual, extraordinary." *Black's Law Dictionary* at 1569 (4th Edition) (1968).

Special is different from certain and it establishes a specific type of academic aid or unusual type of academic aid.

Petitioner came to this law school relying on the representation and agreement that Special Academic Aid would be available. The subsequent acts of respondents indicated that they knew of this agreement, but did nothing to fulfill it. At the end of petitioner's first year the faculty voted down a program which would have provided special tutoring, at least for those in academic trouble. It was not until May 14, 1974 that Dean Roddis proposed a program of Special Academic Aid. Such a program was implemented for fall quarter 1974. It should be noted that the improvement in the performance of Specially Admitted Students corresponds with the start of this program.

The same said argument should be used to contradict the decision of the Washington State Appellate Court when it decided that there was no separate agreement to permit petitioner to attend 1974 summer quarter and have his grades count toward his cumulative grade point average. (See Appendix D at 7) Again the Washington State Appellate Court modified our agreement by not allowing this part of the agreement to be enforceable.

(d) Did the Washington State Appellate Court err in holding that summary judgment without a trial on the merits was the appropriate procedural method of dealing with these issues?

On review, the United States Supreme Court will look at record on summary judgment in light most favorable to party opposing motion for summary judgment. *Poller v. Columbia Broadcasting System, Inc.* (1962) 368 U.S. 464, 7L Ed. 2d 458, 82 S Ct 486.

The Washington State Appellate Court did not comply with Rule 56 of Civil procedure because said Court did not resolve whether there were no genuine issue of material fact as to all the issues. *Gavin v. Peoples Natural Gas Co.* (1980 CA3 Pa) 613 F2d 482.

It was the duty of said court to take everything in record (pleadings, depositions, interrogatories, affidavits) to demonstrate that no genuine issue of material facts exists. *Keiser v. Coliseum Properties, Inc.* (1980, CA5 Ga.) 614 F2d 406.

There were factual issues that were unresolved such as special academic aid, race discrimination, contracts, equal protection, modification of the contract, reasonable and expectations standards, and an expert opinion concerning ambiguity in the contract. Furthermore, other facts concerning whether the respondents adhered to es-

tablished rules, regulations, policies and publications were either overlooked or totally ignored.

These factual issues are which the outcome of this litigation depends in whole or in part. *Balise v. Underwood,* 62 Wn. 2d 195, 381 p. 2d 966 (1963).

The Washington State Appellate Court's omission of the above factual issues released respondents from their burden to show that there is no genuine material issue of fact. *Quadra v. Superior Court of San Francisco* (1974, DC Cal) 378F. Supp. 605. So, all reasonable inferences from the evidence were not resolved against respondents. *Barber v. Bankers Life and Gas Co.,* 81 Wn. 2d 140, 500 p. 2d 88 (1972).

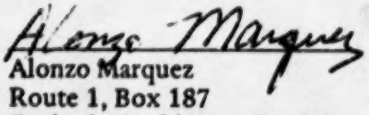
Thus, the said court did not adhere to its duty to view all evidence and reasonable inferences there from in a light more favorable to petitioner. *Sommer v. Hilton Hotels Corp.* (1974, DC NY) 376 F. Supp. 297. *Balise, Supra.*

Summary judgment should not have been granted because the entire record did not show the right to judgment with such a clarity as to leave no room for controversy and it did not establish affirmatively that petitioner cannot prevail under any circumstance. *Prince v. Pittston Co.* (1974, DC W Va). 63 FRD 28.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Dated this 27th day of December, 1982.



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APPENDIX TO

Petition For Writ of Certiorari to the Court of Appeals of the State of Washington.

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APPENDIX "A"
(Filed April 10, 1978, Superior Court of the State of Washington for King County)

SUPERIOR COURT OF THE STATE OF WASHINGTON

ALONZO MARQUEZ,	)	
	)	
Plaintiff,	)	NO. 825250
	)	
vs.	)	Memorandum
	)	Opinion
UNIVERSITY OF WASHINGTON; JOHN HOGNESS, President of the University of Washington; RICHARD RODDIS, Dean of the School of Law; and BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON,	)	
Defendants.	)	

Defendants move for summary judgment to dismiss plaintiff's claim which is predicated on three principal issues, to wit:

1. Defendants discriminated against plaintiff and in so doing violated RCW 49.60.

2. Defendants violated plaintiff's right to equal protection under the federal and state constitutions.

3. Defendants breached the contractual agreements with the plaintiff resulting in damages to plaintiff.

The factual background leading to this action may be summarized as follows:

Plaintiff, a member of a minority group, was admitted to the law school as a special admittee under its Affirmative Action Program, and enrolled in the fall quarter 1972. At the end of plaintiff's first year, his cumulative grade average was 63.94, equivalent to a D average and substantially below the 68 average which students must earn in order to continue law school. During said first year, plaintiff had received failing grades (below 60) in contracts, civil procedure and property 1, in addition to which plaintiff withdrew from two other courses.

Prior to the 1972 school year, the law school had rated *all* applicants using a combination of their scores on the LSAT (law school aptitude test) and their undergraduate grades. Such rating is known as the "predicted first year average". Plaintiff's PFYA was 66.68.

There were approximately 21 minority students in said law school class. Plaintiff was one of 12 students in his class who earned a cumulative grade average of less than 68 for the first year. All 12 were special admittees. Based on established procedure and guidelines, the law school's faculty committee on admissions reviewed the record of all 12 students. Each of them was evaluated individually based on certain established standards and guidelines which included the student's prospect for improving performance, the overall pattern and level of grades, number of classes dropped, grades below 60 and many other personal factors. As a result of such evaluation, 8 of the 12 students, based on the committee's recommendation were allowed to remain in school conditioned on their improving their cumulative grade average to 68 by the end of the second year. The remaining four students, including plaintiff, were terminated. However, the law school Dean thereafter sent a request to all members of the faculty proposing that these four terminated students be readmitted and thereby extend the law school's effort to administer a viable minority legal education program. Based on such recommendation, a special faculty meeting was held and the Dean's proposal accepted.

These four students, including plaintiff, were subject to *different* conditions on their remaining in school as compared to the other eight students who had likewise failed to receive passing grades. The four were required to repeat all classes in which they had not received a 68 average or better grade. However, they were extended the additional concession to drop the lower grade for any course which was repeated rather than counting it in the overall average. In comparison, the other eight students were not allowed to expunge any of the lower grades they had earned during their first year.

As a result thereof, the plaintiff's grade average, at the end of the second year, including three replacement grades for the ones dropped when he entered first year classes, was 67.725. Plaintiff was one of four students with grades under 68, and all of said students were members of a minority group and special admittees.

The law school faculty had previously recommended to have the Dean decide on further termination of students with failing grades and guidelines for this procedure were set up. Consequently, plaintiff and two other students with failing grades were terminated by the Assistant Dean after conferring with the Dean and soliciting comments from each student and faculty members. The fourth student with a grade point average of 67.13 was allowed to remain since he was one of the eight students at the end of the first year who was *not* allowed to drop any low grades in calculating cumulative grade averages and he was therefore in a different position than plaintiff.

The record is quite clear and convincing that in making the deci-

sion to terminate plaintiff, the school considered the overall pattern of plaintiff's grades, his motivation and other particular circumstances which plaintiff and faculty members had presented. It was the Dean's conclusion that plaintiff did not have a reasonable prospect of meeting the normal graduating requirements of the law school. Among the facts considered by the Dean was the scoring achieved by plaintiff in retaking three first year classes in which he had originally scored less than 60 and had scored no higher than 65 on his second attempt.

Plaintiff and his attorney were advised of their right to petition for faculty review of the Dean's decision but did not take advantage of that opportunity. In May of 1975, plaintiff filed a petition for readmission at which time he had enrolled in some law classes for the summer quarter of 1975, as a non-law student. He failed three of the four summer courses and again was denied readmission. The faculty in the fall of 1975 voted 25 to 0, with three abstentions, to deny plaintiff's petition for readmission. Plaintiff was present at the meeting and made a presentation on his own behalf.

Plaintiff claims that the law school discriminated against him; knowing that he was a special admittee with a below passing PFYA, it was duty-bound to provide him with special academic aid and assistance to overcome his deficiencies. In addition, plaintiff's other claims may be summarized as follows:

1. Plaintiff's termination was a violation of the equal protection clause in that other students who likewise failed were allowed to remain;

2. Failure of the school to round-up his grade to a passing one as previously practiced by the school; and

3. Refusing to allow plaintiff medical leave when it should have been obvious to the law school that such should have been granted and that others, similarly situated, were afforded leaves of absence.

4. The law school and plaintiff had entered into a contract, based on his admission and the information then made available to plaintiff which agreement provided that academic assistance would be furnished to him which the school failed to do; and to allow plaintiff's grade for the summer quarter of 1974 to count toward his cumulative average at the end of the second year.

It would also appear that during the school years of 1972-1973 and 1973-1974, the law school had no *formal* tutoring program for special students under its Affirmative Action Program. Such a program had existed in the past and due to some objections by special admittees to be singled out for such a program, it apparently was dropped. However, in the spring quarter of 1974 an informal arrange-

ment for tutorial assistance to special admittees was made available and plaintiff was so advised. In addition, of course, the usual contact between students and members of the faculty was available and faculty members were encouraged to assist students whenever a student felt that he needed special, individualized assistance. There were also review and student sessions for groups of students who indicated a need for such help.

There has been no showing made that the law school had any established policy allowing leaves of absence for medical reasons during the first year. Plaintiff has not shown any violation or non-adherence to said "policy".

It goes without saying, based on the case of *De Funis v. Odegaard*, 82 Wn 2d 11 (1973), that the elimination of serious racial imbalances caused by the under-representation of certain minorities within public legal education constitutes a *compelling state interest*. Therefore, the providing of increased educational *opportunities* to selected racial minorities by favoring such minorities in the law school's admission policy is necessary whenever racial imbalance in both school and in the professions it serves exists and should be eliminated. These are worthwhile goals which should continue to be nurtured. A corollary to the foregoing is the right of the administrative body, absent arbitrary or capricious action, to duly evaluate the total record of students who fail to meet the standards and requirements of the law school; a determination by such administrative body when exercised honestly and upon due consideration of the facts, even if there is room for two opinions, must be upheld.

However, the state also has *a compelling interest* to insist that those aspiring to become members of a certain learned profession which holds itself out to the public as having reached a high degree of deficiency, must be able to meet certain *minimum* standards of proficiency, expertise and intellectual achievement. The gravamen of plaintiff's action revolves itself around the school's alleged failure *to do more* than merely admit him to the law school on a special program, not available to non-minority applicants, since such admission simultaneously imposed the additional duty on the law school, being aware of plaintiff's deficiencies, to provide *more and separate academic aid and assistance* so as to enable plaintiff to meet the minimum standards imposed on all. How far must a state supported institution go to provide such additional benefits to a member of a minority, once the school lowers its scholastic standards to admit such a member to pursue a career in a learned profession? Is this primarily a legislative matter or does special admission to a law school, under these facts, likewise impose a parallel duty on the state to provide a greater

degree of special education, not available to others, and does a failure of such action constitute discrimination under the law?

The court must find that under the now universally established principles of affirmative action, plaintiff was granted certain benefits not available to non-minority students and any discrimination existing was *in favor of plaintiff, not* against him! RCW 49.60 proscribes certain conduct of discrimination AGAINST an individual. Such is not the situation here since plaintiff was granted *additional opportunities,* not available to others, including the taking of repeat courses, the privilege to expunge poor grades for the purpose of raising his grade average, etc. Absent any legislative directive, the court is unable to find any discriminative activity by the law school against this plaintiff on the record before it. The road travelled by a law student toward achieving his degree is a long, difficult and arduous one which imposes on such student, whether specially admitted or not, a continuing duty to search out, sometimes on his own, the help of other students, upper classmen, instructors and other members of the faculty to assist him in overcoming any deficiencies. To paraphrase Justice Holmes' somewhat outdated comments many years ago that a person may have a "constitutional right" to a general education, but he does not have a constitutional right to be a lawyer or a doctor!

At what stage of a student's educational pursuit may a university, acting upon established guidelines, conclude that a student does *not* possess the necessary proficiency, intellectual stimulus or motivation to be a lawyer and therefore terminate him? Is the burden of proof on the University to make a showing that *every conceivable aid* has been provided to such student prior to termination or is it sufficient to show that a reasonable effort has been made to rehabilitate such student by means of different opportunities to "make good" and which opportunities were not available to non-minority students?

The court concludes that the affirmative action program is of a compelling state interest to *assure the admission to the* bar of *qualified members of minorities* and such policy includes the lowering of admission standards and the granting of special benefits, not available to others, to accomplish such purpose. However, the University is only obligated, absent some other legislative determination, to provide *reasonable assistance,* once a student has been especially admitted, and the Univeristy does not have a duty to explore *every conceivable means of extra academic aid* to assure the development of a competent lawyer. Here plaintiff was afforded reasonable and adequate opportunity to meet the minimum standards of scholastic achievement, extended over a period of two years. Unfortunately, he failed to meet that test.

The court further finds that the defendants did not violate plain-

tiff's right to equal protection under either the federal or state constitution. Law school admissions pose an extremely complex problem and require a very delicate balancing of diverse factors. The dean's office and faculty committee sought to identify, by adhering to established guidelines, within the minority category those persons who had the *highest probability of succeeding* in law school. Such classifications and determinations were made on a very reasonable basis, although not made with mathematical nicety or absolute certainty. Here the criteria for admissions and the treatment of plaintiff and other minority students subsequent to admission were not arbitrary and capricious in any way; therefore, the court will not vitiate the judgment of the dean and faculty committees, who are best qualified by training, expertise, and personal knowledge of the student, unless a constitutional violation is shown. Law school admissions need not become a game of numbers; the process should remain sensitive and flexible with room for informed judgment and interpreting mechanical indicators. The school authorities, of necessity, must have some reasonable amount of faculty discretion in admitting, readmitting or terminating a student and the school faculties' decision must enjoy some freedom from interference from other non-educational tribunals. It is only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student. The court is unable in this case, to find any abuse of discretion or any arbitrary or capricious action on the part of the defendants in their evaluation and final dismissal of plaintiff.

Finally, plaintiff's allegation of breach of contract must be considered. Plaintiff premises his allegation on three contracts between him and the University of Washington Law School, namely (a) an agreement to provide him with academic assistance; (b) an agreement to allow his grades for summer quarter 1974 to count towards his cumulative average at the end of the second year; and (c) an agreement to continue to round up all accumulated grade point averages.

It would appear that for some years past a practice had prevailed to allow grades to be rounded up, although the law school faculty voted in June of 1968 not to round cumulative student grades to the nearest whole number; through some misunderstanding that practice had never been instituted in the registrar's office. The matter was raised again in a faculty meeting in March of 1973, at which time the faculty took similar action. Thereafter, the registrar adhered to the faculty's determination. The record is clear that whether grade point averages are rounded up or not, *all students* in plaintiff's class were treated on the same basis. There was no separate agreement between defendant and plaintiff on that issue. Likewise, the court is unable to find any agreement between plaintiff and the law school regarding

his summer 1974 grades to count toward his cumulative average at the end of the second year. In any event, the record is clear that even allowing such cumulative averaging, it would not have helped plaintiff to achieve a passing grade.

Lastly, plaintiff places considerable reliance on the following excerpt from the prelaw handbook of the Association of the American Law Schools reading as follows:

> "Special programs—including recruitment, admission, and financial and *academic* aid—are available for students of minority, ethnic groups." (Emphasis ours).

It is plaintiff's claim that the above clause would constitute a contract on which he had a right to rely. The court does not believe that the above excerpt, standing by itself, would constitute an enforceable contract since its language is too broad to be specifically enforaceable, and there is no clear-cut showing that there was a meeting of the minds between the parties, together with a mutual intent. At best, the above quote constitutes an invitation or announcement to those students who are interested in the aid offered, the size, nature and details of any such aid being subject to agreement between the parties. There was *no* express agreement here.

In conclusion, the court finds that there is no genuine issue as to any material fact relating to plaintiff's claim that defendants violated the state's anti-discrimination law; nor is there any genuine issue on plaintiff's claim as to an alleged violation by defendants of plaintiff's right to equal protection under either the federal or state constitution or as to any breach of contract. The defendants have not committed, under the peculiar and distinct facts of this case, any actionable wrong under any of the theories set forth in plaintiff's complaint. Therefore, defendants' motion for summary judgment is granted.

DATED this 10th day of April, 1978.

_____

Judge

APPENDIX "B"

(Filed April 30, 1979, Clerk, State of Washington Court of Appeals)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

ALONZO MARQUEZ,	)	
	)	
Appellant,	)	
	)	
v.	)	NO. 6581-I
	)	
UNIVERSITY OF WASHINGTON; JOHN HOGNESS, President of the University of Washington; RICHARD RODDIS, Dean of the School of Law; and BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON,	)	DIVISION ONE
	)	
Respondents.	)	

JAMES, J. — In 1972, Alonzo Marquez, a Mexican-American, was admitted to the University of Washington Law School under its affirmative action program for minority applicants. After 1 year of school, Marquez and certain other special admittees in his entering class were initially terminated for poor scholarship. Subsequently, the faculty voted to allow them to continue, conditioned upon certain improvement of their grade point averages by the end of their second year. After 2 years of school, Marquez was terminated permanently.

Marquez brought this suit against the Law School and its officials (collectively Law School) seeking reinstatement and monetary damages. He alleges the denial of equal protection, the violation of the Washington Law Against Discrimination, RCW 49.60, and breach of contract. The trial judge granted summary judgment in favor of the Law School and dismissed the suit.

One of Marquez' contentions on appeal is that the case was not ripe for summary judgment. We agree. At the time of the summary judgment hearing, Marquez had a motion outstanding to compel the Law School to answer certain of his interrogatories. Although Marquez had not noted his motion for hearing, his trial brief in opposition to the Law School's summary judgment motion noted its pendency. Under these circumstances, we hold the trial judge erred in granting summary judgment.

A motion for summary judgment should be granted only if, after considering the pleadings, affidavits, depositions, and all

> reasonable inferences drawn therefrom in favor of the non-moving party, a trial court determines that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law . . . . A summary judgment should not be used as a means to "cut litigants off from their right to a trial."

(Citations omitted.) *Garbell v. Tall's Travel Shop, Inc.*, 17 Wn. App. 352, 353, 563 P. 2d 211 (1977). Until the Law School provides discovery, whether a genuine issue of material fact exists cannot be ascertained.

We do not reach the other issues presented by Marquez' appeal.

Reversed and remanded for proceedings consistent with this opinion.

_____ _____

Chief Judge

WE CONCUR:

_____ _____

APPENDIX "C"
(Filed December 31, 1979, Superior Court of the State of Washington for King County)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ALONZO MARQUEZ,	)	
	)	
Plaintiff,	)	
	)	
—vs—	)	
	)	
UNIVERSITY OF WASHINGTON; JOHN HOGNESS, president of the University of Washington; RICHARD RODDIS, Dean of the School of Law; and BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON,	)	No. 825250
	)	
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS
COURT'S ORAL DECISION

BE IT REMEMBERED, That on the 31st day of December, 1979, at the hour of 8:35 o'clock a.m., the above-entitled and numbered cause came on regularly for hearing before the Honorable GERARD M. SHELLAN, one of the Judges of the above-entitled Court, sitting in Department No. 32 thereof, at the King County Courthouse, in the City of Seattle, County of King, State of Washington.

The plaintiff appeared by and through his counsel, ANTONIO R. SALAZAR, (of ManDonald, Hoague & Bayless);

The defendants appeared by and through their counsel, STEPHEN M. TODD, (of Reed, McClure, Moderi & Thonn, P.S.).

WHEREUPON, the following proceedings were had, to wit:

• •

THE COURT: Good morning.

Please be seated.

This is in the case of Alonzo Marquez, plaintiff, vs. University of Washington, and others, Cause No. 825250.

First of all, I want to thank counsel for their excellent presentation, all the numerous briefs and affidavits you have submitted to me.

This is defendants' second motion for summary judgment in all issues.

Plaintiff commenced this action on March 7, 1977; thereafter amended his complaint and alleging among others, discriminatory practices by defendants in violation of state law, namely, RCW 49.60; violation of plaintiff's rights under the state and federal constitutions' equal protections laws, and various agreements and contractual arrangements between defendants, resulting in damages to plaintiff in the amount of $250,000 for loss of income and other damages; seeking reinstatement to the University of Washington Law School, and praying for additional relief.

Defendants had moved for summary judgment the first time in March of 1978. By memorandum opinion of this Court on April 10, 1978, summary judgment was granted.

Thereafter, plaintiff appealed.

On April 30, 1979, the Court of Appeals, Division No. 1, reversed and remanded on the ground that at the time of the summary judgment hearing, plaintiff had an unnoted motion outstanding to compel defendants to answer certain interrogatories.

The merits of the case were not reached by the Appeals Court.

Neither plaintiff's nor defendants' then counsel, in oral argument before this Court on defendants' first motion for summary judgment brought up at any time the matter of the unanswered interrogatories.

Reference is made to the Court's memorandum opinion of April 10, 1978, as to the findings then made. They need not be repeated here, except as supplemented herein below.

After defendant had filed his new motion for summary judgment, plaintiff gave notice of his desire to take depositions of certain individuals; including the then Dean of the Law School and other law professors.

On December 21, 1979, extensive argument was presented to this Court on several issues with emphasis by plaintiff on the defendants' failure to grant him sick leave and/or the right for him to withdraw from law school, the defendants' contractual breaches, including the interpretation of the term "academic aid."

This Court has carefully reviewed all the memoranda, briefs, affidavits, interrogatories, as well as the three volumes of court records.

I've also reviewed the second supplemental brief and affidavit

received from plaintiff on December 28, 1979.

The Court concludes that the answers to the eleven interrogatories primarily dealing with sick leave and leaves of absence which were then outstanding upon argument on the defendants' first motion for summary judgment last year, do not create any genuine issue of material fact which would warrant a trial on such issues.

The total record on said issues reveals conclusively that first-year students were not entitled to leaves of absence. The Law School catalog clearly set out its policy on withdrawals.

The plaintiff, however, has cited two instances occurring after his termination from the law school where:

> (a) One student in good standing, whose mother had become seriously ill, and who depended on her son for substantial support, was allowed to withdraw under these extraordinary circumstances; and
>
> Second, a female student in good standing was granted maternity leave in her second year, and then was later readmitted.

No other instances of withdrawal or leaves of absence not in compliance with the then existing policies and guidelines of the school were known.

The Court concludes that plaintiff cannot rely on the above two situations to complain about any discriminatory practice against him in violation, or violations of his constitutionally-protected rights. Nor is there any credible evidence whatever that the defendant, its staff, administration, or faculty, had acted arbitrarily or capriciously on these issues.

The above two instances relate to different time and different fact patterns. Plaintiff would not be entitled, as a matter of right, to demand the same relief in contravention of established guidelines and rules applicable to all others.

Plaintiff next raised the issue of contractual breaches arising out of certain wording in the 1972-73 prelaw handbook of the Association of American Law Schools and the Law Admissions Council, as relating to the University of Washington Law School:

> "Special Programs—Including Recruitment, Admissions and Financial and Academic Aid—are available for students of minority ethnic groups,"

and end of excerpt from the prelaw handbook.

Plaintiff has raised a very interesting issue. It is plaintiff's position that the term "academic aid" ripened into an enforceable con-

tractual relationship when the plaintiff elected to enter law school as a qualified member of a minority group, and that the law school was then legally obligated, under these particular circumstances, to provide him with special "tutorial aids." "Tutorial aids."

It is the plaintiff's position that the term "academic aid" is practically synonymous with the term "tutorial aid."

In addressing this issue, this Court will consider both references to "financial and academic aid." Are such terms definite and certain enough, subject to specific performance? And do they entail the necessary elements of a contractual relationship, to wit, an offer and acceptance, mutually of assent, namely, meeting of the minds as to the essential terms of the contract? I.e., does the term "financial aid," without more, in the handbook, contain a promise by the alleged offeror, in this case the University of Washington Law School, to pay all of a student's financial needs throughout law school? Or does such notice or invitation advise the student that some financial assistance may be available subject to terms and conditions to be worked out between the school and the applicant, depending on his or her need, and the ability of the public institution to garner enough funds to provide such help to those in need?

Absent arbitrary or capricious conduct, or violation of any law, or mandate of the law school, the issue of "financial aid" by the student versus the availability of public funds for such purposes, has to be carefully weighed and apportioned by the school authorities predicated on established guidelines.

Thusly, the term "financial aid" by itself does not rise to the dignity of an enforceable contract merely by a student's election to enroll at the University of Washington Law School, whether under any affirmative action program or not.

Let us now proceed to the matter of "academic aid" as propounded by plaintiff.

In his brief of December 19, 1979—an excellent brief, incidentally—plaintiff frames the issue quite succinctly; namely, (In my opinion this is the crux of the matter.)

"Would a reasonable person in Alonzo Marquez's position, given all the attendant circumstances, believe that the law school would provide him with academic assistance if he enrolled at the law school as a specially-admitted minority student? And did such belief translate into a contract by his act of enrolling at the University of Washington Law School?"

Unfortunately, for plaintiff, the elements required for the formation of any contract, as set forth above, cannot be vitiated

because of some personal belief, hope, or expectancy on the part of one party only. There must be a meeting of the minds without which the parties would act in a vacuum.

The Court concludes, as a matter of law, that the phrase "academic aid," same as the term "financial aid," by itself, as interpreted by plaintiff, is too broad and indefinite to result in an enforceable contract upon an applicant's enrollment in school.

Academic aid certainly may, and often does, include special tutoring on a one-to-one or group basis. That is not to say that such aid may not take a variety of various forms and means, such as those extended to plaintiff and established by the University at the time.

If such phrases, as above quoted, without more, do constitute a distinct offer acceptable upon enrollment by the student, then let us ponder, for just a moment, the consequences of similar phrases frequently found in schools' handbooks:

> "Our graduates are leaders in the legal/medical profession."
>
> "Job assistance provided upon graduation."
>
> "Our teaching faculty is unique."
>
> "Our graduates are eagerly sought after by government and private industry alike."

And many of these like it.

What are the legal consequences to an institution of higher learning when a student enrolls after perusing such handbook?

Possibilities are unlimited. However, none of them can be considered an unqualified offer, subject to acceptance by mere enrollment and enforceable contractually thereafter.

However, let's assume that the term "academic aid" was an offer which ripened into a contractual arrangement in this case after the student enrolled and entered law school, and quoting and reading from the handbook.

At the time of plaintiff's acceptance in the fall of 1972, twenty-five other minority students were admitted, of which total twenty-two were special admittees. Admittees. All members of a minority.

Of these, seventeen graduated. About seventy-seven percent. Two of them progressed no further than the first year. And plaintiff was one of three special admittees who attended beyond the first year, but failed to graduate.

Plaintiff was one of twelve students, after the first year, who failed to reach the required sixty-eight percent average. Plaintiff's cumulative grade point average after the first year was 63.94.

He had failed courses in contracts, civil procedure, and property I; all three of which are basic required first-year courses. He had withdrawn from two other courses.

To determine whether defendants violated any of plaintiff's constitutional protective rights, or engaged in any discriminatory practices, or breached any enforceable contractual rights to plaintiff, let us look at the record as submitted to this Court:

> (a) Contrary to the vote of the law school's committee on admissions and readmissions to drop plaintiff for insufficient scholarship, plaintiff appealed to the faculty and was readmitted when the faculty reversed the decision of the committee and allowed plaintiff to continue subject to certain conditions:
>
> > (a) to repeat all classes in which a below sixty-eight grade had been received; and
> >
> > (b) special permission to drop the lower grade of the submitted course rather than the cumulative overall grade average.

It must be remembered, at the end of the first year, twelve students failed; all minority members.

Each case was considered and evaluated on its merits, including the overall pattern and level of grades, including those under sixty percent.

Personal factors which may have contributed to the students' low motivation and prospects for performance were considered. Eight of the students were allowed to remain, initially all of whom had higher grade averages than plaintiff on the express condition that they would be required to raise their overall average above sixty-eight in the second year. Those eight were not allowed to drop any course with the lower grade.

The other four students were dropped initially and readmitted upon the special admission of the Dean of the law school, as above stated.

There were many notable differences in these two groups of these eight students and four students, respectively, as more specifically set forth in the affidavit of the then Assistant Dean, Robert S. Hunt.

The Court is unable to detect or infer the slightest irregularity in the processing or classification of the failing students. In fact, every effort was made to accommodate those who were earnestly and diligently seeking a second chance.

At the end of the second year four members of this class, inclu-

ding plaintiff, had failing grades again. That means under sixty-eight.

At that time plaintiff's grade average, including three replacement grades for repeat courses, then stood at 67.725; 67.725.

Plaintiff and one other student were members of the group of four which had been at the bottom of the first-year class. Three students were then finally terminated by the Dean in September of 1974; after additional consultations with the Assistant Dean, Mr. Charles Z. Smith, and solicitation of, and comments from, each student and all faculty members in whose classes these students have been enrolled.

Although plaintiff also complained that his 1974 summer grades were not included in his overall average, any such inclusion for the summer of 1974 would not have improved plaintiff's standing.

After enrolling originally for thirteen hours of law studies during the summer of 1974, he withdrew from one three-hour class; one class was cancelled, apparently due to the illness of the instructor; another three-hour class plaintiff received an incomplete; another, his grade was forty-four.

Plaintiff and his then attorney were duly advised of the right of appeal after the September, 1974, termination, but later abandoned their election to do so.

In addition to concessions and rights granted to plaintiff, members of the faculty in the period in question, 1972/1974, provided some review and study sessions, as well as counseling, upon requests. Student groups were organized for such purposes on a fairly regular basis.

Plaintiff, in his answer to interrogatories, especially No. 20, admits, at least in part, the existence and availability of such assistance; including review and study sessions by his professors, as well as study group sessions by students themselves.

Plaintiff also received some private tutoring from his former attorney, a member of the Washington State Bar.

Dean Hunt's affidavit reveals that no formal tutoring program existed for special admittees during the school years of 1972 to '73 and 1973 to 1974.

According to Dean Hunt's affidavit, which is uncontradicted, such programs had existed prior to that time, but had been objected to by special admittees on the grounds that they did not wish to be singled out in a formal paternalistic tutoring session.

In the spring of 1974 informal tutoring assistance was made available to special admittees. According to Dean Hunt's affidavit

notice of this was given to plaintiff of such arrangement, but was not responded to by plaintiff. Plaintiff denies such notification from Dean Hunt.

Plaintiff's counsel and plaintiff's affidavit provide some additional information as to certain changes in grading policy which was adopted by the law School in May of 1974, allowing courses to be repeated and adjustment in grades.

However, in the Court's opinion, the controlling issue is a policy of the law school as it existed at the time of plaintiff's unsatisfactory scholastic performance. The evidence is overwhelming that plaintiff, and several others, were then granted academic concessions not then available or offered to others.

Based on the foregoing resume of special academic considerations granted plaintiff and others similarly situated, one must reach the inescapable conclusion the plaintiff was extended every reasonable opportunity to succeed in law school.

No case has been cited, and the Court is unaware of any rule of law that would impose a mandate on a public or private educational institution, i.e., University of Washington Law School, under the circumstances disclosed by this record to assure or guarantee the "making of a lawyer."

The function of such institutions, and the implementation of any affirmative action program, is to afford every reasonable opportunity to such qualified student to succeed. But the major contribution must, of necessity, be borne by the individual himself and not by the state.

Motivation; devotion to the law; perseverance; and addiction to serious studies, are the basic ingredients of anyone seeking such professional career.

Finally, absent arbitrary or capricious behavior, or violation of any law of public policy, the matter of admission, readmission, or termination of a student, should be left to those best qualified by learning and expertise, their familiarity with the problems, the students, and the curriculum; namely, the administration, the staff and faculty of such institutions, and not the judiciary.

The Court, therefore, concludes, as a matter of law, that there is no genuine issue of any material fact as to the matters submitted in connection with the defendants' second motion for summary judgment.

Such motion is granted on all issues raised.

The Court's order is stayed for a period of ninety days to allow

plaintiff to complete his pretrial discovery, if such additional time is required by plaintiff.

If any genuine issue of material fact should develop as a result of such further pretrial discovery during such extended 90-day period, it should be immediately brought to the Court's attention for any reconsideration of this order.

This completes the Court's memorandum opinion on this issue.

Are there any questions?

MR. SALAZAR: Your Honor, will that be ninety days from today?

THE COURT: Yes. Let me ask counsel.

Do you believe that ninety days will give you sufficient additional time?

I notice that you have noted the deposition of the Dean sometime the first week in January.

MR. TODD: That's correct.

THE COURT: You wanted to take some additional two depositions.

MR. TODD: Two or three additional ones, yes.

THE COURT: Do you believe ninety days reasonable under the circumstances and allow you to complete your discovery?

MR. TODD: I think it's sufficient time, Your Honor.

THE COURT: Ninety days from date.

That brings us up to the end of March. I don't have a calendar here, but I assume March 31, 1980, unless that's a Sunday.

MR. SALAZAR: Your Honor, then proper procedure would be for the plaintiff to submit to the Court and opposing counsel some type of brief or explanation of any reason you should reconsider.

THE COURT: Well, if defendants' counsel representing the University and its officials believe some issue has been raised during the additional pretrial discovery, I think that should be brought to the Court's attention by either counsel.

We're interested in determining whether there was any change by reason of additional discovery.

Any further questions?

(No response.)

THE COURT: Okay. Thank you, gentlemen.

MR. SALAZAR: Thank you very much, Your Honor.

APPENDIX "D"

(Filed May 17, 1982, Clerk, State of Washington Court of Appeals)

COURT OF APPEALS OF THE STATE OF WASHINGTON

ALONZO MARQUEZ,	)	
Appellant,	)	
v.	)	No. 9080-1-I
	)	
UNIVERSITY OF WASHINGTON: JOHN HOGNESS, President of the University of Washington; RICHARD RODDIS, Dean of the School of Law; and BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON,	)	Division One
Respondents,	)	Filed May 17, 1982

ANDERSON, C. J.

FACTS OF CASE

A former law student, Alonzo Marquez, appeals the dismissal of his suit against the University of Washington and certain of its officials. We affirm.

Marquez, of Mexican-American descent, was admitted to the University of Washington Law School (hereinafter Law School) in the fall of 1972 as a special admittee under its affirmative action program. During the school years, 1972-73 and 1973-74, the Law School did not have a formal tutorial assistance program for specially admitted students. Informal unstructured academic assistance, however, was available to those students who requested it. The plaintiff did not take full advantage of the opportunities afforded him in that regard.

The Law School requires all law students to maintain a grade point average of 68 in order to continue. Marquez was one of 12 students who earned a grade point average less than the required 68 at the end of his first year. His average was 63.94.

All 12 of those students were individually evaluated according to established standards. The faculty committee terminated Marquez and three other specially admitted first year students. The Dean of the Law School, however, convinced the faculty to retain Marquez and the other three on certain conditions. These four students were required to repeat all classes in which they had not received a grade of 68 or better. They were allowed to drop the lower grade for any course which was repeated rather than being required to count it in their overall average.

At the end of Marquez' second year, his grade point average was 67.725, just below the required 68 average. Since the established policy of the law school at the time was not to round grade averages upward, Marquez was again terminated for low scholarship. At the time of this second termination, Marquez was also taking summer school courses at the Law School and the grades in those courses were not included in his cumulative average. The grades he obtained in his summer courses would have lowered, not improved, his grade point average.

In November 1977, Marquez, through his attorney, filed a complaint against the University of Washington and others alleging breach of contract, denial of his equal protection rights and violations of the state law against discrimination, RCW 49.60. By his suit, Marquez sought readmission, $250,000 damages, attorneys' fees and costs. In the spring of 1978, the Superior Court granted the University's motion for a summary judgment of dismissal. Marquez appealed. On April 30, 1979, this court reversed the trial court on procedual grounds, the basis being that at the time summary judgment was entered Marquez had outstanding a motion to compel answers to interrogatories. On remand, additional discovery was done and on July 8, 1980, the Superior Court entered a new order granting the University's motion for summary judgment. Marquez' pro se appeal from that order presents three basic issues.

ISSUES

ISSUE ONE. Did the trial court err in granting the University's motion for summary judgment on the breach of contract claims?

ISSUE TWO. Did the trial court err in granting the University's motion for summary judgment on the equal protection claim?

ISSUE THREE. Did the trial court err in granting the University's motion for summary judgment on the anti-discrimination claim?

DECISION

ISSUE ONE.

CONCLUSION. The trial court did not err in granting summary judgment on the contract claims because the uncontroverted facts establish that the University of Washington School of Law did not breach its education contract with Marquez.

When Marquez applied and was admitted to law school, the pre law handbook of the Association of American Law Schools provided, in part, the following description of the Law School:

Special programs - - including recuitment, admission, and finan-

cial and academic aid - - are available for students of minority ethnic groups.

Marquez contends that the above language became part of the contract between himself and the Law School upon his matriculation and that the Law School breached the "academic aid" term by not providing him with a formal structurized tutorial assistance program.

It is now generally accepted that the relationship between a student and a university is primarily contractual in nature. *Maas v. Corporation of Gonzaga Univ.*, 27 Wn. App. 397, 400, 618 P.2d 106 (1980). " 'Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; . . .' " *Peretti v. Montana*, 464 F. Supp. 784, 786 (D. Mont. 1979), rev'd on other grounds, 661 F.2d 756, 757 (9th Cir. 1981) quoting, Note, *Expulsion of College and Professional Students - - Rights and Remedies*, 38 Notre Dame L.J. 174, 183 (1962). For the purposes of this case, we will assume that the singular reference to academic aid contained in the prelaw handbook was definite enough to form a part of Marquez' contract with the Law School.

However, while

> "[i]t is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the university to provide some framework into which to put the problem . . . .. This does not mean that 'contract law' must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted . . . .. The student-university relationship is unique, and it should not be and can not be stuffed into one doctrinal category. . . ."

Lyons v. Salve Regina College, 565 F.2d 200, 202 (1st Cir. 1977), cert. denied, 435 U.S. 971, 56 L. Ed. 2d 62, 98 S. Ct. 1611 (1978), quoting with approval from *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626, (10th Cir.), *cert. denied*, 423 U.S. 898, 46 L. Ed. 2d 131, 96 S. Ct. 202 (1975). Thus, in light of the wide latitude and discretion afforded by the courts to educational institutions in academic matters, *Maas v. Corporation of Gonzaga Univ., supra* at 402, the University is entitled to some leeway in modifying its programs from time to time so as to properly exercise its educational responsibility. *Mahavongsanon v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976). The concept of a binding, absolute, unchangeable contract is particularly anomalous in the context of post graduate level work. *Mahavongsanan v. Hall, supra.*

In addition, the construction of a contract and the legal effect of its terms present questions of law for the trial court which may be

properly resolved by summary judgment. *Murray v. Western Pac. Ins. Co.*, 2 Wn. App. 985, 992-93, 472 P.2d 611 (1970). *Accord, Giles v. Howard Univ.*, 428 F. Supp. 603, 605-06 (D.D.C. 1977). Further, where, as here, the agreement is not an integrated one, the standard is that of reasonable expectations -- what meaning the party making the manifestation, the Law School, should reasonably expect the other party to give it. *Lyons v. Salve Regina College, supra* at 202, quoting *Giles v. Howard Univ., supra* at 605. *See* J. Calamari & J. Perillo, *Contracts* § 3-10, at 118-19 (2d ed. 1970).

Applying the foregoing to the case before us, it is evident that the prelaw handbook did no more than announce that certain "programs" including "academic aid" to certain prospective students "are available". It did not tie the Law School to a specific program or type of "academic aid". Nothing therein created a right in the applicant to obtain a law degree absent his meeting and maintaining reasonable standards established by the Law School. "The possibility of academic failure is implicit in the nature of the educational contract between a student and a university." *Maas v. Corporation of Gonzaga Univ., supra* at 401.

The uncontroverted affidavits and depositions in this case establish that while the Law School, at the time of Marquez' matriculation, did not have a structured or mandatory tutorial assistance program, it did provide other types of academic aid opportunities unusual to law schools at that time. 1/ These included the availability of faculty assistance outside the classroom to specially admitted students upon request, small class sections for first year students, a rigidly structured legal writing and research program employing full time faculty members and the possibility of taking lighter course loads. Marquez did not take full advantage of these opportunities and, in fact, declined offers of out of class assistance from his legal writing instructor.

Furthermore, Marquez was permitted to remain in school after his first year, even though he failed to meet the Law School's grade point requirements, and he was also allowed to expunge his first year's failing grades by repeating courses which he had failed.

1/ Prior to Marquez' first year, the Law School did have a formal tutoring program for specially admitted students only. Due to student concern about stigmatization and a general dissatisfaction with the student tutors, however, the program was eliminated and informal voluntary assistance opportunities were substituted. This change was a reasonable modification of the Law School's academic assistance program made in a good faith exercise of its educational responsibility. *See Mahavongsanan v. Hall*, 529 F.2d 448, 450, (5th Cir. 1976).

There being no issue of material fact with respect to the foregoing, the trial court did not err when it granted a summary judgment dismissing Marquez' case since, on the face of it, the University lived up to its contract with Marquez by providing him with academic assistance and the opportunity to obtain additional academic assistance had he desired to take advantage of the opportunities extended.

Marquez also argues that the University breached its contract with him by not rounding off his grade point average upward and by not including his summer school grades in his cumulative average prior to his final termination. Our review of the entire record in a light most favorable to Marquez demonstrates, however, an absence of any issue of material fact respecting the purported promises between Marquez and the Law School. The Law School did no more than follow its established procedures and there is no evidence of a separate agreement.

The summary judgment entered on the contract issues was proper. *See* CR 56 (c); *Morris v. McNicol,* 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974).

ISSUE TWO.

CONCLUSION. Because the record does not establish or raise an inference of arbitrary or capricious action on the part of the University, the trial court did not err in granting summary judgment on the equal protection claim.

In his complaint, Marquez alleges that various actions of the law school regarding his termination and the school's medical leave of absence policy violated his right to equal protection as guaranteed by our state and federal constitutions.

Absent a suspect classification or infringement of a fundamental interest, however, a classification which is rationally related to a legitimate state interest is not violative of a person's right to equal protection. *Reed v. Reed,* 404 U.S. 71, 75-76, 30 L. Ed. 2d 225, 92 S Ct. 251 (1971); *DeFunis v. Odegaard,* 82 Wn.2d 11, 31, 507 P.2d 1169 (1973), *vacated as moot and remanded,* 416 U.S. 312, 40 L. Ed. 2d 164, 94 S. Ct. 1704, *no action on remand,* 84 Wn.2d 617, 529 P.2d 438 (1974). Because Marquez' equal protection claims are not related to discrimination on the basis of a suspect classification and the right to a university education is not a fundamental interest, *Rosenstock v. Board of Governors,* 423 F. Supp. 1321, 1326 (M.D. N.C. 1976), the "rational basis" test applies.

Further, absent arbitrary or capricious action on the part of the Law School, a court will not interfere with the academic decisions of a university. *Maas v. Corporation of Gonzaga Univ., supra* at 402-403. *See Connelly v. University of Vt.,* 244 F. Supp. 156, 159-60

(D. Vt. 1965).

In the case before us, all the decisions of the University regarding Marquez were made pursuant to reasonable and established school policies and any deviations therefrom were rationally related to legitimate interests in the Law School. There was no showing of an abuse of discretion or of any arbitrary or capricious action. Thus, the trial court did not err in granting defendant's motion for summary judgment as to the equal protection claim.

ISSUE THREE.

CONCLUSION. The trial court did not err by granting summary judgment on the discrimination claim because there is no evidence whatsoever that the University discriminated against Marquez or treated him unfairly.

Before a violation of this state's law against discrimination can be established, the aggrieved party must show "practices of discrimination *against* any of its inhabitants . . ." *(Emphasis added.) RCW 49.60.010; see Ellingson v. Spokane Mortgage Co.*, 19 Wn. App. 48, 54-55, 573 P.2d 389 (1978). Here, there is no evidence that Marquez was discriminated against by the University. The record establishes to the contrary and shows that Marquez was treated with great solicitude by the University of Washington and its Law School and was accorded every reasonable consideration in his quest for a legal education. Therefore, a summary judgment of dismissal on this claim, as on the others, was proper.

As the experienced Superior Court judge who ruled on the motions terminating this case in the trial court for the final time summarized it in his oral decision:

> Based on the foregoing resume of special academic considerations granted plaintiff and others similarly situated, one must reach the inescapable conclusion the plaintiff was extended every reasonable consideration, every reasonable assistance, and every reasonable opportunity to succeed in law school.
>
> No case has been cited, and the Court is unaware of any rule of law that would impose a mandate on a public or private educational institution, i. e., University of Washington Law School, under the circumstances disclosed by this record to assure or guarantee the "making of a lawyer."
>
> The function of such institutions, and the implementation of any affirmative action program, is to afford every reasonable opportunity to such qualified student to succeed. But the major contribution must, of necessity, be borne by the individual himself and not by the State.
>
> Motivation; devotion to the law; perseverance; and ad-

diction to serious studies, are the basic ingredients of anyone seeking such professional career.

Affirmed.

Anderson, C. J.

APPENDIX "E"
(Filed June 16, 1982, Court of Appeals of the State of Washington)

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

ALONZO MARQUEZ, *Appellant,* v. UNIVERSITY OF WASHINGTON; JOHN HOGNESS, President of the UNIVERSITY of Washington; RICHARD RODDIS, Dean of the School of Law; and BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON, *Respondents.*	No. 9080-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The Appellant, Alonzo Marquez, having filed his motion for reconsideration herein and the court having determined that such motion should be denied, Now, therefore, it is hereby

ORDERED that the motion for reconsideration filed herein be, and the same hereby is, denied.

Dated this 16th day of June, 1982.

_____
Chief Judge

APPENDIX "F"

THE SUPREME COURT

STATE OF WASHINGTON

Dated October 8, 1982

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Counsel:
Re; Supreme Court No. 48884-3- Alonzo Marquex v. University of Washington - Court of Appeals No. 9080-1-I

Following consideration of the above entitled Petition for Review on October 8, 1982, the following notation order was entered on page 241, Volume 2, of the Petition for Review Docket:

"DENIED"

/s/ William H. Williams
Acting Chief Justice

Very truly yours,

Reginald N. Shriver
Acting Clerk

Office-Supreme Court, U.S.
FILED
FEB 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1149

IN THE

Supreme Court of the United States

October Term, 1982

ALONZO MARQUEZ,
Petitioner,

vs.

UNIVERSITY OF WASHINGTON; JOHN HOGNESS, President of the University of Washington; RICHARD RODDIS, Dean of the School of Law; and BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF APPEALS FOR THE
STATE OF WASHINGTON

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 82-1149

IN THE

Supreme Court of the United States

October Term, 1982

ALONZO MARQUEZ,
Petitioner,

vs.

UNIVERSITY OF WASHINGTON, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents, University of Washington, et al., respectfully request that this court deny the petition for writ of certiorari seeking review of the opinion of the Court of Appeals for the State of Washington in this case. That opinion is reported at 32 Wn.App. 302.

STATEMENT OF THE CASE

Judge Gerard M. Shellan of the Superior Court of the State of Washington for King County summarized the facts in his memorandum opinion granting respondents' motion for summary judgment of dismissal. We adopt them as follows:

Petitioner, Alonzo Marquez, a member of a minority group, was admitted to the respondent University of Washington's law school as a special admittee under its affirmative action program and enrolled in the fall quarter 1972. At the end of Marquez' first year, his cumulative grade average was 63.94, equivalent to a D average and substantially below the 68 average which students must earn in order to continue law school. During said first year petitioner Marquez had received failing grades (below 60) in contracts, civil procedure and property I, in addition to which Marquez withdrew from two other courses.

Prior to the 1972 school year, the University of Washington's Law School had rated all applicants using a combination of their scores on LSAT (Law School Aptitude Test) and their undergraduate grades. Such a rating is known as the "predicted first year average." Marquez' PFYA was 66.68.

There were approximately 21 minority students in the University of Washington law school class. Marquez was one of 12 students in his class who earned a cumulative grade average of less than 68 for the first year. All 12 were special admittees. Based on established procedures and guidelines the law school's Faculty Committee on Admissions reviewed the record of all 12 students. Each of them was evaluated individually based on certain established standards and guidelines which included the student's prospect for improving performance, the overall pattern and level of grades, number of classes dropped, grades below 60 and many other personal factors. As a result of such evaluation, eight of the 12 students, based on the Committee's recommendation, were allowed to remain in school conditioned on their improving their cumulative grade average to 68 by the end of the second year. The remaining four students, including Marquez, were terminated. However, the law school dean

thereafter sent a request to all faculty members proposing that these four terminated students be readmitted and thereby extend the law school's effort to administer a viable minority legal education program. Based on such recommendation, a special faculty meeting was held and the dean's proposal accepted.

These four students, including Marquez, were subject to different conditions on their remaining in school as compared to the other eight students who had likewise failed to receive passing grades. The four were required to repeat all classes in which they had not received a 68 average or better grade. However, they were extended the additional concession to drop the lower grade for any course which was repeated rather than counting it in the overall average. In comparison, the other eight students were not allowed to expunge any of the lower grades they had earned during their first year.

As a result thereof, Marquez' grade average, at the end of the second year, including three replacement grades for the ones dropped when he entered first year classes, was 67.725. Petitioner Marquez was one of four students with grades of 68 or below, and all of said students were members of a minority group and special admittees.

The law school faculty had previously voted to have the dean decide on further termination of students with failing grades, and guidelines for this procedure were established. Consequently, Marquez and two other students with failing grades were terminated by the assistant dean after conferring with the dean and soliciting comments from each student and faculty member. The fourth student with a grade point average of 67.13 was allowed to remain since he was one of the eight students at the end of the first year who was *not* allowed to drop any low

grades in calculating cumulative grade averages and he was therefore in a different position than Marquez.

In making the decision to terminate Marquez the school considered the overall pattern of Marquez' grades, his motivation and other particular circumstances which Marquez and faculty members had presented. It was the dean's conclusion that Marquez did not have a reasonable chance of meeting the normal graduating requirements of the law school. Among the facts considered by the dean were the scoring achieved by Marquez in retaking three first year classes in which he had originally scored less than 60 and scored no higher than 65 on his second attempt.

Marquez and his attorney were advised of their right to petition for faculty review of the dean's decision, but did not take advantage of that opportunity. In May of 1975 Marquez filed a petition for readmisson at which time he had enrolled in some law school classes for the summer quarter of 1975 as a non-matriculated student. He failed three of the four summer courses and again was denied readmission. The faculty in the fall of 1975 voted 25 to zero with three abstentions to deny Marquez's petition for readmission. Marquez was present at the meeting and made a presentation on his own behalf. Thereafter petitioner Marquez filed his complaint in this action.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *Introduction.*

The jurisdiction of the Supreme Court to review decisions of the state courts is codified in 28 USC § 1257, which reads in pertinent part as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> 3. By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

2. *Issues 3 and 4 of Petition are not federal questions.*

The only grounds on which petitioner Marquez can seek jurisdiction of the court in this matter is by a claim that he has at issue in this suit some title, right, privilege or immunity specially set or claimed under the Constitution of the United States. None of the other grounds outlined in 28 USC § 1257 are in any way applicable to the case at bar.

In reviewing the Questions Presented at p. 1 of Marquez' Petition, it is arguable that his questions Nos. 1 and 2 raise such issues. However, it is clear that his questions Nos. 3 and 4 regarding breach of contract and the appropriate use of summary judgment raise no such claims, but are rather issues of state law.

This court has long held that if it assumes jurisdiction of a case arising in state court because of a federal question it will not proceed further in considering separate questions of state law. *Murdock v. Memphis*, 20 Wall. 590 (1874). Thus, those two questions are inappropriately asserted as issues for this court to review and are no jurisdictional base for a review by this Court.

3. *No important legal issues or substantial or unsettled questions arising under the Constitution exist in Issues 1 and 2 of the Petition nor is there any conflict between the decision of the state court and that of any U.S. Court of Appeals or this Court.*

Even if petitioner has raised a federal question in Nos. 1 and 2 of the Questions Presented to the court in his petition, the court should deny the writ requested because there is no impotant legal issue involved in this case nor are there substantial, unsettled federal questions arising under the Constitution.

Petitioner cites no case indicating there is any important legal issue in the case at bar or any substantial or unsettled federal question arising under the Constitution. In fact, the law is clear in this area. This court has established that an institution's discretionary academic decisions will not be interfered with by the court unless they are shown to be arbitrary and capricious or illegally discriminatory. See, *Board of Curators v. Horowitz*, 435 U.S. 78, 55 L.Ed.2d 124, 98 S.Ct. 948 (1978). Petitioner has made no such showing. This court has also upheld the type of affirmative action program under which Marquez was admitted to the University's law school. *University of California Regents v. Bakke*, 438 U.S. 265, 57 L.Ed.2d 750, 98 S.Ct. 2733 (1978). Therefore, further review of such a program is unnecessary by this court.

In addition, petitioner has failed to cite any case indicating a conflict between the state court of appeals' decision and any U.S. Supreme Court or U.S. Court of Appeals decision. There is, in fact, no such conflict regarding the issues raised in Nos. 1 and 2 of petitioner's Questions Presented.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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